

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ANTHONY MARIN et al.,

Plaintiffs and Appellants,

v.

COSTCO WHOLESALE
CORPORATION,

Defendant and Appellant.

A116847, A118116
(Alameda County Super. Ct.
No. RG04150447)

**ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed herein on December 23 2008, be modified as follows:

1. On page 13, the second full paragraph is modified to read:

In sum, no California court decision, statute, or regulation governs bonus overtime, the DLSE Manual sections on the subject do not have the force of law, and the DLSE advice letters on the subject are not on point. Thus, there is no controlling California authority apart from the directive that overtime hours be compensated at a rate of no less than one and one-half times the regular rate of pay. (Lab. Code, § 510, subd. (a).) In deciding whether defendant's bonus plan fulfills that directive, we are persuaded that the DLSE Manual provisions for overtime on production bonuses set forth a valid formula. (See *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 563 [court may adopt a DLSE statutory interpretation embodied in a void regulation if it independently determines that the interpretation is correct].) We conclude that defendant's plan is consistent with that formula, and thus that the plan does not violate California law.

2. On page 14, the third sentence in the first full paragraph is modified to read as follows (the citation following the sentence is unchanged):

Therefore, as one commentator has observed, overtime on a bonus based on hours worked should be calculated in the same manner as overtime on a bonus based on production, under the formula set forth in section 49.2.4 of the Manual.

There is no change in the judgment.

The petition for rehearing is denied.

Marchiano, P.J.

TRIAL COURT: Alameda County Superior Court

TRIAL JUDGE: Honorable Ronald M. Sabraw

ATTORNEYS:

Schneider Wallace Cottrell Brayton Konecky, Todd M. Schneider, Joshua Konecky and W.H. Willson, IV for Plaintiffs and Appellants.

Law Office of Daniel U. Smith and Daniel U. Smith for Plaintiffs and Appellants.

Seyfarth Shaw, Kenwood C. Youmans, David D. Kadue, Aaron R. Lubeley, and Daniel J. Fazio for Defendant and Appellant.